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No. 94-2044

In The

Supreme Court of the United States

October Term, 1995

INDUSTRIAL EXCESS LANDFILL, INC.,
HYBUD EQUIPMENT CORPORATION
and HYMAN BUDOFF,

Petitioners,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court abused its discretion by exercising jurisdiction, based on diversity of citizenship, over a declaratory judgment action to determine rights to insurance coverage.

2. Whether the district court denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution by granting summary judgment in favor of Respondent.

3. Whether the district court correctly applied Federal Rule of Evidence 1004 in granting summary judgment in favor of Respondent.

4. Whether the district court's *sua sponte* dismissal of Petitioners' counterclaim, in conjunction with its grant of summary judgment in favor of Respondent, denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution.

5. Whether the district court's denial of Petitioners' post-judgment motion denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution.

PARTIES

Petitioner Industrial Excess Landfill, Inc. is an Ohio corporation with its principal place of business in Akron, Ohio. Industrial Excess Landfill, Inc. is owned and/or controlled by Petitioner Hyman Budoff.

Petitioner Hybud Equipment Corporation is an Ohio corporation with its principal place of business in Akron, Ohio. Hybud Equipment Corporation is owned and/or controlled by Petitioner Hyman Budoff.

Petitioner Hyman Budoff is an individual. Mr. Budoff is a citizen of the State of Ohio.

Respondent Hartford Accident and Indemnity Company is an insurance company organized under the laws of Connecticut with its principal place of business in Hartford, Connecticut.*

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* In accordance with Rule 29.1 of the Revised Rules of the Supreme Court of the United States, Respondent states that Hartford Accident and Indemnity Company is a wholly owned subsidiary of the Hartford Fire Insurance Company which, in turn, is a wholly owned subsidiary of ITT Hartford Group, Inc. which, in turn, is a wholly owned subsidiary of ITT Corporation, a publicly owned corporation. Hartford Accident and Indemnity Company has no non-wholly owned subsidiaries.

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Petitioners,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY IN OPPOSITION

The Respondent, Hartford Accident and Indemnity Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Industrial Excess Landfill, Inc., Hybud Equipment Corporation, and Hyman Budoff.

OPINIONS BELOW

This was a declaratory judgment action brought in the United States District Court for the Northern District of Ohio by Respondent, Hartford Accident and Indemnity Company ("Hartford"), pursuant to 28 U.S.C. § 2201. Hartford sought a declaration of rights as to Petitioners' demands upon Hartford for insurance coverage for two environmental claims brought against Petitioners. By Memorandum and Opinion filed May 7, 1993, the district court granted Hartford's motions for partial summary judgment and dismissed Petitioners' counterclaim, thereby resolving all claims in favor of Hartford.

The Sixth Circuit affirmed the judgment by *per curiam* opinion filed January 27, 1995. The Sixth Circuit denied Petitioners' motion for rehearing *en banc* by order filed March 15, 1995.

All of the foregoing orders are unpublished; however, the orders are reproduced in the Appendix to the Petition for Certiorari (App. A1-3; A4; A16-23.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Sixth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right from a final order of the district court in favor of Respondent.

The jurisdiction of the United States District Court for the Northern District of Ohio was invoked pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Declaratory Judgment Act, 28 U.S.C. § 2201
2. Fed. R. Civ. P. 56
3. Fed. R. Civ. Evid. 1004
4. U. S. Const. Amend. V
5. Fed. R. App. P. 4(a)(4)

STATEMENT OF FACTS

Hartford Accident and Indemnity Company ("Hartford") commenced this action for declaratory judgment against Industrial Excess Landfill, Inc., Hybud Equipment Corporation, and Hyman Budoff ("Petitioners") in the United States District Court for the Northern District of Ohio. Hartford sought a declaration of the rights and obligations of the parties under five liability insurance policies either issued, or allegedly issued, by Hartford to the Petitioners. The gravamen of the complaint was that Hartford was not obligated to defend or indemnify the Petitioners for an underlying Superfund action (42 U.S.C. § 9601 *et seq.*), brought by the United States against Petitioners entitled *United States of America v. Industrial Excess Landfill, et al.*, Case No. 5:89 CV 1988 ("the *USEPA* case".) Generally, the USEPA sought remediation of a closed landfill located in Stark County, Ohio, which was owned

by Petitioner Industrial Excess Landfill, Inc. and operated by the Petitioners.

Federal jurisdiction for the declaratory action was based on diversity of citizenship (28 U.S.C. § 1332) in that Hartford is a citizen of Connecticut, the Petitioners are citizens of Ohio, and the amount in controversy exceeded $50,000.00. The district court is authorized to grant the type of relief requested by Hartford pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

The underlying *USEPA* case was pending in the Northern District of Ohio before District Judge John M. Manos. In its filing documents, Hartford indicated that its declaratory judgment action was related to the *USEPA* case; accordingly, this action was also assigned to Judge Manos.

A. The 1981 to 1985 Policies

Hartford issued Policy No. 45 CBP 132102 with a policy period of August 31, 1981 to June 30, 1984, which included the standard pollution exclusion.

Hartford issued Policy No. 45 CBP NHO404, with a policy period of June 30, 1984 to June 30, 1985, which included the standard pollution exclusion. (These will be referred to collectively as "the 1981 to 1985 policies.")

B. The Alleged 1968 to 1971 Policies

Petitioners made their original demand for coverage only pursuant to the 1981 to 1985 policies. By letter dated June 16, 1988, Petitioners made an amended demand upon Hartford for policies which they claimed Hartford

had issued to Petitioners between 1968 and 1971. (These will be referred to as "the alleged 1968 to 1971 policies.") Petitioners produced certificates of insurance which listed one of the three Petitioners, Hybud Equipment Corporation. After extensive discovery, Petitioners did not produce any policy documents for any of the alleged 1968 to 1971 policies. Hartford conducted a search of its files to locate any information, including policy documents, relative to the alleged 1968 to 1971 policies. No policies or documents material to Petitioners' alleged policies were ever found.

C. The Sphere Drake Case

Prior to commencement of this action, Petitioners had commenced a declaratory judgment action in the Summit County (Ohio) Court of Common Pleas against another insurance company, Sphere Drake Insurance Company, Ltd. ("the *Sphere Drake* case"). In the *Sphere Drake* case, Petitioners sought defense for three environmental actions pending against them, including the *USEPA* case. Although Petitioners had made demands for coverage against Hartford and numerous other insurers, they did not join Hartford or any other insurers in the *Sphere Drake* case. The policy at issue in *Sphere Drake* contained a standard pollution exclusion.[1] Among the issues litigated

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[1] The pollution exclusion contained in the 1981 and 1985 Hartford policies is identical to the pollution exclusion construed and applied by the Ohio Supreme Court in *Hybud Equipment Corporation et al. v. Sphere Drake Insurance Company*, 46 Ohio S. 3d 657, 597 N.E.2d 1096 (1992).

in the *Sphere Drake* case was the interpretation and application of the standard pollution exclusion to the *USEPA* case. Petitioners lost the *Sphere Drake* case on appeal to the Supreme Court of Ohio. *Hybud Equipment Corp., et al. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657, 597 N.E. 2d 1096 (1992), *cert. denied*, 113 S.Ct. 1585 (1993).

D. The Pleadings

Petitioners moved to dismiss Hartford's complaint on several grounds, including: (1) no "actual controversy" within the meaning of 28 U.S.C. § 2201; (2) no jurisdiction in that Hartford had not "properly denied" the Petitioners' claim before filing the action; (3) no jurisdiction for Hartford's failure to join other insurers as necessary or indispensable parties; (4) the amount in controversy was less than the $50,000 jurisdictional amount; and (5) the court should abstain from jurisdiction because the action would have a "broad impact on state policy." The district court denied Petitioners' motion to dismiss.

Petitioners responded with a three-count counterclaim against Hartford for breach of contract, the tort of "bad faith" (based on its alleged failure to defend Petitioners) and the tort of "infliction of emotional distress."[2] Hartford answered the breach of contract count but moved to dismiss the tort counts. The district court granted, with prejudice, Hartford's motion to dismiss the

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[2] Petitioners alleged the infliction of emotional distress on behalf of the corporate entites as well as Petitioner Hyman Budoff.

emotional distress claim and allowed the "bad faith" count to stand.

On December 19, 1991, the State of Ohio commenced an action against Petitioners in the Northern District of Ohio styled *State of Ohio ex. rel. Fischer v. Industrial Excess Landfill, Inc., et al.*, Case No. 5:91 CV 2559 ("the *State of Ohio* case"). The *State of Ohio* case paralleled the *USEPA* case, seeking reimbursement for any amount the state was required to spend in connection with remediation of the site, as well as civil fines and penalties against Petitioners.[3] Petitioners tendered defense of the *State of Ohio* case to Hartford, and the district court granted Hartford leave to amend its complaint to include the State of Ohio claim in the declaratory judgment action. Petitioners responded with a motion to dismiss which was substantively identical to their original motion. The district court denied the motion and Petitioners responded with a three-count counterclaim, including the emotional distress count previously dismissed with prejudice by the district court. The district court again dismissed the emotional distress claim.

E. Discovery

Hartford and the Petitioners engaged in extensive written and oral discovery. In particular, Hartford responded to several requests for written discovery related to Hartford's knowledge of the existence and/or terms and conditions of any policies issued by Hartford to the Petitions. No copies of the missing policies were

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[3] The *State of Ohio* case was also assigned to Judge Manos.

ever produced by Petitioners. After searching and reviewing voluminous records in response to written discovery, Hartford determined that it had no copies of the alleged missing policies nor any other documents in its possession related to any such policies. Petitioners also subpoenaed records from the Ostrov Insurance Agency ("Ostrov") and had informal access to its files and personnel as well. Ostrov produced no policy documents related to the alleged 1968 to 1971 policies.

F. Hartford's Motions for Summary Judgment

On June 22, 1992, Hartford filed its motion for partial summary judgment for the 1981 to 1985 policies on grounds that the standard pollution exclusion barred coverage for the *USEPA* and the *State of Ohio* claims (R. 106). On July 2, 1992, Hartford filed a second motion for partial summary judgment as to the alleged 1968-1971 policies on grounds that defendants could not establish the existence of those policies or the terms of coverage for the *USEPA* and the *State of Ohio* claims (R. 116, R. 117). Both motions were fully briefed. Petitioners attached numerous evidentiary exhibits in support of their position.

On September 16, 1992, prior to any ruling on Hartford's motions, the Supreme Court of Ohio issued its opinion in the *Sphere Drake* litigation.[4] The Supreme Court of Ohio held that, under Ohio law, the standard pollution exclusion barred coverage to Petitioners for the

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[4] *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992).

USEPA case. On October 27, 1992, Hartford moved for partial summary judgment on the additional ground that, under Ohio's doctrine of collateral estoppel, the *Sphere Drake* decision barred Petitioners from re-litigating the meaning of the pollution exclusion or its applicability to the *USEPA* case.

G. The District Court's Ruling

On May 7, 1993, the district court issued its memorandum and opinion granting summary judgment in favor of Hartford. As to the 1981-1985 policies, the district court found that: (1) under Ohio's doctrine of collateral estoppel, the *Sphere Drake* litigation was dispositive of the issue presented and Hartford was entitled to judgment for the *USEPA* case; and (2) the State of Ohio complaint was factually indistinguishable from the *USEPA* complaint and, pursuant to the *Erie* doctrine, Hartford was entitled to summary judgment as to the *State of Ohio* case.

As to the alleged 1968 to 1971 policies, the court found that Petitioners produced no evidence (after three years of discovery) which could establish the terms or conditions of the policies. Absent such evidence, Petitioners could not establish their rights to coverage and, thus, Hartford was entitled to summary judgment. The district court also dismissed the Petitioners' counterclaim, ruling that its declaratory judgment in favor of Hartford necessarily defeated the counterclaim. (See May 7, 1993 Memorandum and Opinion, R. 145; Petition, Appendix A16-23).

On May 20, 1993, Petitioners filed a motion for "reconsideration" of the district court's May 7, 1993 order (R. 147). Petitioners attached a specimen policy form to their motion which they asserted had been discovered only in the week following the district court's May 7, 1993 order. Although Petitioners acknowledged that the form was not a Hartford policy form and was not part of the alleged 1968 to 1971 policies, Petitioners nevertheless asserted relevance in that the form was "the same or substantially the same" as policy forms used by Hartford from 1968 to 1971.[5] In addition to asserting their "new evidence," Petitioners took the district court to task for not explaining, in sufficient detail to satisfy Petitioners, its rationale for rejecting various contentions made in opposition to Hartford's motions. Hartford timely responded to the post-judgment motion on June 3, 1993. That same day, prior to any ruling by the district court on the post-judgment motion, Petitioners filed their first notice of appeal. On June 10, 1993, the district court, apparently believing Petitioners were abandoning their attempt at post-judgment relief, denied the post-judgment motion "as moot." Petitioners then filed their second notice of appeal, purporting to appeal only from the June 10, 1993 order denying their post-judgment motion.

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[5] Aside from the lack of basic evidentiary foundation, the document rebuts this assertion on its face in that the words, "**1966 Policy Jacket Specimen**" and "**Orig. Printing February 1990**" appear in bold type on the form. Petitioners could not identify the author or publisher of the document.

H. The Sixth Circuit's Rulings

On June 25, 1993, the Sixth Circuit, *sua sponte* dismissed Petitioners' first notice of appeal as ineffective pursuant to Federal Rule of Appellate Procedure 4(a)(4). Petitioners then filed a third notice of appeal which purported to appeal from "all adverse rulings" of the district court.

Hartford moved the Sixth Circuit to dismiss the second and third notices of appeal for lack of appellate jurisdiction and to remand the case to the district court for further ruling on Petitioners' post-judgment motion. Petitioners resisted the motion. On November 10, 1993, the Sixth Circuit denied Hartford's motion to dismiss Petitioners' appeals and consolidated their second and third notices of appeal.

After briefing and oral argument, the Sixth Circuit filed its *per curiam* order of January 27, 1995, affirming the district court's judgment in all respects. Petitioners filed a motion for re-hearing *en banc*; the motion was denied by the Sixth Circuit by its order of March 15, 1995.

Petitioners seek a writ of certiorari from the Sixth Circuit's January 27, 1995 and March 15, 1995 orders.

SUMMARY OF ARGUMENT

This case presents no issue appropriate for this Court's exercise of discretionary jurisdiction.

Petitioners attempt to manufacture an issue for review by claiming a division among circuits, and a lack of guidance by this Court, as to the proper exercise of

federal jurisdiction over declaratory judgment actions involving interpretation of state law. No such controversy exists. Contrary to Petitioners' claim that this Court has not provided guidance since *Brillhart v. Excess Insurance of America*, 316 U.S. 491 (1942), this Court re-addressed this issue during the last Term. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. 4544 (1995). In *Wilton*, this Court reaffirmed its teaching that jurisdiction over declaratory judgment actions is not susceptible to rigid, formulaic analysis and remains primarily one of discretion with the district court since it is usually, if not always, in the best position to evaluate the circumstances under which relief is sought. In the case at bar, the district court exercised its discretion to retain jurisdiction over this case. This case presents no issue which was not explicitly dealt with by this Court in *Wilton*.

Moreover, the purported split of authority as to declaratory judgment jurisdiction simply does not exist in the context presented here. Every decision cited by Petitioners contains a common circumstance absent here: existence of a concurrent, related action in another forum giving rise to the possibility of conflicting or inconsistent rulings on the same fact or issue. Absent this crucial circumstance, considerations of equity, comity, and federalism, which are at the heart of any discretionary abstention, disappear. There was no parallel case pending between the parties and this action was assigned to the same district judge who was presiding over the underlying actions at issue. Simply stated, there was no other forum with which the district court's exercise of judicial authority could conflict.

The remaining questions present no basis for discretionary review by this Court. Petitioners merely express displeasure with the outcome below and seek this Court's review by the expedient of claiming that these adverse rulings amount to constitutional violations. Such claims are utterly devoid of merit.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT'S EXERCISE OF JURISDICTION WAS APPROPRIATE

Petitioners' primary contention for certiorari is that the district court was required to abstain from jurisdiction since the dispute involved questions of insurance coverage to be resolved by application of state law (Petition, pp. 8-15.) Petitioners attempt to conjure up deep divisions among the courts below as to the circumstances under which federal courts entertain declaratory judgment actions for insurance coverage, and declare that it has been more than 50 years since this Court has provided guidance as to "the use of declaratory judgment jurisdiction in an insurance dispute." (Petition, p. 15.)

During the last Term, this Court held that the discretionary test announced in *Brillhart v. Excess Ins. Co. of America*, 315 U.S. 491 (1942) governs the exercise of jurisdiction over declaratory judgment actions for insurance coverage. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. 4544 (1995). In *Wilton*, the district court stayed a declaratory judgment action during the pendency of a parallel state court action. The Court of Appeals followed *Brillhart*,

affirming the district court's decision based on an abuse of discretion standard. This Court framed the issue as whether the discretionary standard of *Brillhart* or the "exceptional circumstances" test of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) governed the district court's authority to exercise or refuse jurisdiction. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. at 4545. This Court reaffirmed *Brillhart*, holding that the distinct features of the Declaratory Judgment Act justifies a standard vesting greater discretion with the district court. This Court reiterated its teaching of *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952) that jurisdiction in any particular case is dependent on consideration of the attendant circumstances and that the district court is best able to determine the efficacy of jurisdiction "because the usefulness of the declaratory remedy, and the fitness of the case for resolution are peculiarly within their grasp." *Id.* at 4548.

Presented with Petitioners' motion for abstention, the district court here exercised its discretion to retain jurisdiction over the case. Its decision to do so and the Sixth Circuit's affirmance are perfectly consistent with this Court's holding in *Wilton*. The circumstances presented here offer no opportunity for precedential value beyond this Court's pronouncement in *Wilton*.

Moreover, Petitioners' contention that an indiscernible pattern developed in the courts below is disingenuous. As was the case in *Wilton*, the locus of the issue as to discretionary jurisdiction in *every* case cited by the Petitioners is the propriety of exercising jurisdiction where another court of equal competence is hearing a

parallel or related matter which requires resolution of the same fact or issue.

In *Nationwide Mutual Fire Insurance Co. v. Willenbrink*, 924 F.2d 104 (6th Cir. 1991), for example, Nationwide was sued in state court by the underlying plaintiff as a defendant in the negligence action. Although Nationwide was dismissed as a defendant in the negligence action, the state court "passed all issues of coverage on the merits, to be litigated after the liability action is tried." *Id.* at 104. Nationwide then filed an action in the district court, seeking a declaration of noncoverage. The district court granted judgment in favor of Nationwide. On appeal, the Sixth Circuit found the record unclear as to whether the district court had been informed that "the state court had expressly reserved the coverage question to a later date." *Id.* at 105. In light of the "duty of comity owed by federal courts to the state courts" the Sixth Circuit remanded the case to the district court to determine whether the state court had retained jurisdiction over the coverage action. *Id.* at 105. The concern the Sixth Circuit sought to ameliorate was the possibility of a direct conflict of judicial power with a court of equal competence; it did not suggest, even by remote implication, that the district court should decline jurisdiction merely because the declaratory action might require application of state insurance law.

Similarly, in *Omaha Property and Casualty Insurance Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991), discretionary exercise of jurisdiction arose from conflicting rulings from a state and federal court on the same factual determination. In *Omaha Property*, the underlying plaintiff sued the insured in state court arising from an auto

accident involving the insured's son. The insurer defended the action under reservation but sued in federal court, seeking a declaration of noncoverage. In the underlying tort case, the insured moved for summary judgment, contending that the family purpose doctrine and the theory of negligent entrustment were not applicable under state law. The factual predicate of the motion was that the insured had expressly told the son not to drive the car. The state court denied the motion, holding that questions of fact existed as to the son's permissive use of the auto. In the declaratory action for coverage, however, the district court came to the opposite conclusion, granting summary judgment based upon its factual finding that the minor had no reasonable belief of his entitlement to the use of the car. In holding that the exercise of jurisdiction over the declaratory judgment action was inappropriate, the Sixth Circuit again focused its analysis on the confusion of "dual decisions" from two competent courts on the same question. *Omaha Property*, 923 F.2d 446, 448 (6th Cir. 1991). The Sixth Circuit did not suggest, let alone hold, that federal courts should generally abstain from applying state law in declaratory judgment actions.

The remaining cases cited by Petitioners involve the same concern. *See e.g., Allstate Insurance Co. v. Mercier*, 913 F.2d 273 (6th Cir. 1990) (jurisdiction best exercised by the same court that will hear the underlying tort claim); *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*, 791 F.2d 460 (6th Cir. 1986) (exercise over declaratory judgment inappropriate where underlying suits, which turned on same factual question, were pending in another federal court); *American Home Assurance Co. v.*

Evans, 791 F.2d 61 (6th Cir. 1986) (exercise over declaratory judgment inappropriate where declaratory action raised complicated issues of fact and state court had accepted jurisdiction of same subject matter); *Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir. 1984) (exercise of jurisdiction over declaratory judgment inappropriate where plaintiff attempted to "have federal court do what state court has already refused to do.")

Although these cases present a variety of factual and procedural backdrops, the unifying principle is that all address the fundamental problem of a federalist court system: two courts entertaining the same issue with the possibility of inconsistent or conflicting results. That circumstance is conspicuous by its absence in this case. First, there was no other litigation between Hartford and Petitioners. In addition, the district court which exercised jurisdiction over this action was also presiding over the underlying actions at issue in the declaratory action. Simply stated, there was no other forum with which the district court's decision could conflict. Thus, the position urged by the Petitioners – that federal courts should generally abstain from declaratory actions requiring application of state law – has not been propagated in any case cited to this Court.

Finally, the district court was not without guidance as to the construction of the pollution exclusion under state law. The Supreme Court of Ohio had construed the same pollution exclusion and applied it to the same complaint to bar coverage. Under these circumstances, no prediction of state law is required of the district court nor uncertainty as to the result.

II. THE COURTS BELOW CORRECTLY APPLIED THE STANDARD FOR SUMMARY JUDGMENT

Petitioners next seek review by contending that summary judgment was improvident and "amounts to a violation of due process and equal protection of law." (Petition, pp. 15-19.) Petitioners cite no case in support of their proposition that summary judgment in a private, civil action violates Fifth Amendment protections. Rather, Petitioners re-present the same "facts" and arguments made below with an unsupported assertion that a metaphorical pendulum has swung too far in favor of summary judgment and that the courts below should be "reminded" as to the scope of summary judgment. (Petition, p. 16.) It is a transparent attempt to have this Court re-weigh the record below and come to a different conclusion. There is no issue appropriate for discretionary review.

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment where, after adequate time for discovery, a party who will bear the burden of proof at trial fails to establish the existence of an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The substantive law identifies which facts are material and the judge must view the evidence presented "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Although the movant bears the initial burden, once it establishes the absence of an essential element of the nonmovant's case, a burden of production shifts to the nonmovant to demonstrate a material question as to an element essential to the nonmovant's case. To meet its

burden, the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and the mere existence of some alleged factual dispute will not defeat an otherwise proper motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As this Court made abundantly clear in *Celotex*, there is no express or implied requirement that the movant produce affidavits or other affirmative evidence *negating* the nonmovant's claim. *Celotex*, 477 U.S. at 323.

Examination of the district court's May 7, 1993 memorandum demonstrates that the court applied these standards precisely. The thrust of the motion for summary judgment as to the alleged 1968 to 1971 policies was that the Petitioners demanded benefits under an alleged written contract but, after three years of discovery, there was a void of evidence which would establish the terms and conditions of any such contracts. Petitioners responded with the evidence summarized in their Petition (see Petition, pp. 16-18) except for the "specimen policy" now asserted.[6] Applying Ohio substantive law, the district

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[6] As set forth in the Statement of Facts, Petitioners attached the specimen policy to its motion for reconsideration as "newly discovered evidence" a week *after* the district court granted summary judgment. Although Petitioners' affidavit acknowledged that they could establish no evidentiary link between the document and either Hartford or Petitioners, they nevertheless asserted it was similar to forms used by Hartford in the relevant era. The document refutes this assertion on its face. (R. 147.)

court held that Petitioners would carry the burden of proof at trial as to the express terms and conditions relied upon "for the policy and contract are the basis of the insurer's obligation and measure of its liability." R. 145, Memorandum of Opinion; Appendix to Petition, A22-23 quoting *Lynd v. Sandy & Beaver Valley Farmers Mutual Ins. Co.*, 103 Ohio App. 408, 145 N.E.2d 453 (1957). The district court found that Petitioners produced some evidence of policy issuance but specifically found that this would not meet Petitioners' burden at trial to prove the terms and conditions which would entitle them to prevail. Absent such evidence, summary judgment was appropriate.

Petitioners overlook the salient point of the judgment below by merely re-arguing that they produced some evidence as to existence; Ohio law requires proof of the specific terms which would entitle Petitioners to relief. Petitioners cite no law to the contrary nor any basis upon which this Court should exercise discretionary review.

III. THE DISTRICT COURT CORRECTLY APPLIED FEDERAL RULE OF EVIDENCE 1004 TO THE EVIDENCE

Petitioners contend that this Court should grant discretionary review with respect to the district court's alleged failure to "recognize and apply" Federal Rule of Evidence 1004. (Petition, pp. 19-21.) This contention suffers from two fundamental defects: (1) the district court's application of Fed. R. Evid. 1004 was not raised on appeal to the Sixth Circuit, and (2) the record establishes that the district court applied Fed. R. Evid. 1004 in precisely the manner urged by Petitioners. Petitioners merely dispute

the district court's ruling as to the legal significance of that evidence.

It is axiomatic that issues not raised below may not be raised on petition for certiorari absent exceptional circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992). There is no mention anywhere in the record as to the district court's consideration or application of Fed. R. Evid. 1004. As this assignment of error was not previously raised, Petitioners claim of errors must fail on this basis alone.

Generally, Fed. R. Evid. 1004 provides that an original document is not required to prove the contents of a writing if the contents can be established by other means. Petitioners simplistically argue that since the district court found the certificates of insurance insufficient to establish the *terms* of any policy issued to Petitioners, it follows that the district court failed to "recognize and apply" Fed. R. Evid. 1004. Petitioners' proposition is directly refuted by the district court's opinion:

> The nature of an insurer's obligation is not altered or impaired because an original or a complete copy of the policy cannot be produced. *See* Couch on Insurance 2d, *Evidence*, § 79:6. However, when an original is lost or destroyed the party seeking to enforce the policy has the burden of proving its issuance and the terms it contained. *Id.; Lynd v. Sandy & Beaver Valley Farmers Mut. Ins. Co.*, 103 Ohio app. 408, 145 N.E.2d 453 (1957). Therefore, under Ohio law, "in order to recover . . . the express terms and conditions relied on must be proven, for the policy and contract are the basis of the insurer's obligation and measure of its liability." *Lynd*, 145

> N.E.2d at 456. The defendants' certificates, affidavits and documents do not provide any evidence of the specific coverages, conditions, terms or definitions of the policies at issue.

See May 7, 1993 Memorandum and Opinion, R. 145.; Petitioner, Appendix A23.

The district court's opinion makes clear that it *did* consider Petitioners' secondary evidence but, viewing it through the "prism of the substantive law," found it insufficient. As the Petitioners failed to raise the issue below and the district court applied Fed. R. Evid. 1004 correctly, there is no basis present for the exercise of this Court's discretionary review.

IV. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONERS' COUNTERCLAIMS

Petitioners next contend that the district court's dismissal of Petitioners' counterclaims, simultaneous with its entry of summary judgment, violated Petitioners' Fifth Amendment rights. Once again, Petitioners cite no case in support of their constitutional claim nor any other basis for this Court's discretionary review.

The scope of this action was for insurance coverage for two underlying cases. Hartford contended it owed no coverage; Petitioners' counterclaim contended that Hartford did owe coverage and sought tort liability based upon Hartford's alleged breach of a known contractual duty. The *sine qua non* to all of the claims of the lawsuit was whether Hartford owed any contractual duty to Petitioners.

Count I of Petitioners' counterclaim alleged breach of the same contract for which Hartford sought a declaration of non-coverage (R. 23). Thus, Count I of Petitioners' counterclaim was simply the mirror image of Hartford's complaint. Petitioners' breach of contract action necessarily fails if, as a matter of law, Hartford owed no contractual duties to Petitioners. Count II of Petitioners' counterclaim alleged the tort of bad faith. Under Ohio law, an action for "bad faith" cannot lie where the insurer held a justifiable belief that it owed no contractual duty. *Wasserman v. Buckeye Union Casualty*, 32 Ohio St. 69, 290 N.E.2d 837 (1972). Hartford had more than a justifiable belief; it owed no contractual duty to Petitioners as a matter of law.

Petitioners had ample opportunity to respond on the issues of fact and law presented by this case (R. 141; 142; 147). The logical and necessary effect of the district court's ruling was that Petitioners' claim must fail for the same reasons which justify summary judgment in favor of Hartford. Petitioners offer nothing to warrant this Court's discretionary review.

V. THE COURTS BELOW CORRECTLY DENIED PETITIONERS' MOTION FOR POST-JUDGMENT RELIEF

Finally, Petitioners claim constitutional error in the denial of their post-judgment motion. Petitioners cite no authority for their claim. Petitioners have declined and even resisted efforts to obtain further ruling from the district court on their post-judgment motion. Petitioners

cannot now assert error from confusion which they themselves caused, particularly where they have resisted all efforts to return to the district court for further rulings on their post-judgment motion. Moreover, the issue of the merits of Petitioners' post-judgment motion has been presented to and rejected by the Sixth Circuit; Petitioners offer no basis for this Court's discretionary review.

Petitioners' post-judgment motion presented only two bases for relief: (1) reconsideration in the form of a re-presentation of Petitioners' original arguments, and (2) consideration of the specimen policy as "newly discovered evidence" pursuant to Federal Rule of Civil Procedure 60(b). Less than two weeks after filing its motion, and prior to any opportunity for the district court to rule, Petitioners filed their first notice of appeal.[7]

This Court has made clear that the filing of a post-judgment motion tolls the time for appeal from a final judgment under Federal Rule of Appellate Procedure 4(a)(4). *Griggs v. Provident Consumer Discount*, 459 U.S. 56 (1982). Thus, Petitioners' right to appeal was not at risk when they filed their first notice of appeal. Given the timing of Petitioners' notice of appeal, the district court apparently concluded that Petitioners wished to abandon all post-judgment relief and appeal from the district court's May 7, 1993 order. The district court denied the post-judgment motion "as moot" on June 10, 1993.

Following the Sixth Circuit's dismissal of their first appeal for lack of jurisdiction, Petitioners made clear

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[7] Hartford's response to the motion was not due until the day Petitioners filed their notice of appeal.

their intent to forego any further ruling from the district court by filing a third notice of appeal from "all adverse rulings" of the district court. Moreover, Petitioners' resisted another opportunity to seek further ruling from the district court when they opposed Hartford's motion in the Sixth Circuit to remand the case to the district court for ruling on the post-judgment motion. A party may not complain on appeal of errors that he himself invited or provoked the court to commit. *Harris v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991). The doctrine of invited error is a branch of the doctrine of waiver and prevents a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. *Id.* at 61. Petitioners seek to take advantage of confusion created by their own procedural misadventures and have waived any right to further ruling on their post-judgment motion by deliberately foregoing and even resisting a clear opportunity to do so. *See, e.g., Huang v. Board of Governors*, 902 F.2d 1134 (4th Cir. 1990) (litigant cannot have it both ways by opposing motion then claiming court abused its discretion by ruling as it requested.)

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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